

# Alternative Dispute Settlement in International Law: Resolving Commercial Disputes through Arbitration

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## Abstract

The increasing volume of international trade, coupled with the computer-nature of many of these relationships, has led to greater reliance on arbitration to resolve contractual disputes. This settlement of disputes by a non-judicial third party is increasingly called for, in international. Contracts because it is cheaper, quicker, and more private than resolving disputes through litigation. Equally important, however, is the fact that it can take place in a neutral location. The increase trade with countries such as China, Japan and Korea where mediation rather than litigation of disputes is traditional, has given added impetus to this trend. The growing attractiveness has resulted in the establishment of arbitration centers in world capitals such as London, Cairo, Hong Kong and Stockholm and major cities as Geneva and New York. Recognition and enforcement of international arbitration agreements and awards is generally controlled through multilateral treaties. An outgrowth of this trend has been the emergence of several major arbitral institutions that have conducted their own sets of rules and procedures. However, the parties to a contract are free to opt for a more informal or ad hoc arbitration arrangement based on their own set of guidelines. Such agreements are legally enforceable as long as the parties have agreed to abide by the arbitrator's decision. In Cameroon however, since the passage of the OHADA Treaty was signed and ratified in 2000, it is applicable in the territory of Cameroon. This is the first treaty of its kind in Africa to deal with arbitration matters sometimes referred to as well.

**Keywords:** International trade, contractual disputes, multilateral treaties.

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## INTRODUCTION

Disputes are an inescapable fact of life, and the crises they engender are pretty much shared by all. When we are stuck in a dispute, we have four basic needs: to bring our thoughts and feelings under control; to understand the process for resolving the thing; to save time and money and to figure out and follow through with a plan for reaching a fair result. If we could, we'll all avoid serious conflicts, because they so often cause us untold misery, both emotionally and financially. Even if a dispute doesn't involve a lot of money, the passions it produces are oftentimes sky high. Business activities entered into nowadays, involve complex activities and chains of persons make commercial disputes unavoidable. Disputes may arise between contracting parties, individuals or even partners in a partnership. Oftentimes, people simply walk away from grievances; such avoidance is considered by some to be all too common. It is therefore important to take time to review the terms of the contract, *rampala clauses*, etc. to ensure continuity of the contract. Also, in case of contracts that

must go on, continuity ensures that the aims and objectives of contracting parties are contained in agreements which are drawn taking into consideration the local and international laws that might be binding on the parties in appropriate cases. Since a fundamental objective of international law is maintenance of peace, the technique of conflict management falls into two categories:

### **Non-Judicial Methods: Negotiation**

Which is the most common means of resolving disputes consists of discussions between the interested parties with a view to reconciling divergent opinions, or at least understanding the different positions maintained. Negotiation involves mutual goodwill, flexibility and sensibility.

### **Mediation**

Involves the use of a third party to encourage the disputing parties to come to a settlement. The mediator has no authority to order or direct the disputing

parties, his power is only that of persuasion and conciliation. The mediator seeks to facilitate agreement by defining issues, encouraging negotiations and seeking compromises. The success of mediation depends on the good faith of the parties to the dispute and the impartiality of the mediator.

### Conciliation

Is used for international disputes and involves a third party investigation of the basis of the dispute and the submission of a report embodying suggestion for a settlement. As such, it involves elements of mediation. Conciliation reports are only proposals and do not constitute binding decisions. They are thus different from arbitration awards.

### Arbitration

Is a process in which an impartial third person listens to the opposing parties in a dispute and renders a decision for them. Arbitration is private, usually voluntary, and almost always binding. Because both federal and local governments favour arbitration of disputes, a number of statutes require certain disputes to be arbitrated, such as management/labour disputes. The reasons arbitration is so popular include: Arbitration is usually faster than litigation. The American Arbitration Association reports that the average time for its arbitrations to be concluded in 110 days from the filing of the demand or submission for arbitration. Furthermore, arbitration is the most important non-judicial method and by far, the most popular method of dispute the settlement since its decisions are more often binding on the parties.

## 1.2 Development of Arbitration in International Commerce

The nature of disputes litigated has considerably changed over time, from a predominance of private business and property cases to personal injury accident claims and cases involving products liability, domestic relations, criminal law and government regulatory actions. Against this backdrop, methods of settling disputes are emerging both in and out of courts, in businesses, in diplomacy and in communities. Settling disputes out of court permit people with disputes to have more active participation in and more control over the process for solving their own problems than do traditional methods of dealing with conflict. Settlements reached through negotiation, mediation or arbitration promise faster results than do traditional legal, managerial or bureaucratic processes – and at a fraction of the cost. Yet savings and time are not the only reasons for much of the rapidly increasing enthusiasm for settling disputes. Decisions produced by collaboration among those who must live with the results can be tailored to the parties' needs. The resolution of a dispute by two corporations, are more apt to produce mutually

satisfactory solutions to their own disputes than are outside decision makers.

Negotiated or mediated settlements are far more likely to preserve any continuing relationship between the parties than is a court battle. There is growing evidence that people who reach agreement themselves are more likely to abide by them than people who are told what to do either by a judge or magistrate of the law. They are also more willing to renegotiate their agreement as circumstances change. Parties involved in a contract agreement may agree to submit their differences to a third party in whom they have confidence and whose decision they will accept and enforce. To resolve a dispute in this manner without recourse to the courts is the essence of arbitration and its major feature is that a dispute can only be referred to arbitration with the consent of both parties. The acceptance by the disputing parties for arbitration can be found in their contract as an arbitration cause or as a result of a compromise between the parties. Rather than file a law suit, the disputing parties agree to let a neutral third party decide on the issue at hand. An arbitrator's decision is called an *award* and binding on the parties. It is subject to a limited judicial review. To obtain a judicial review, a party must show that an illegal award, fraud, or gross mistake was made in the process. In rare cases, arbitrations may be imposed by law and this type is called compulsory arbitration. This is usually the case involving public interest emergency disputes between public employees; for example public services such as the police officials.

A dispute on the international scene may arise not only between States but also between States and international organizations, and or between persons. Not all matters are however submitted to arbitrators; only those which do not deal with public order. The term *international business arbitration* was largely put to use in by the European Convention on International Business Arbitration signed on April 21<sup>st</sup> 1961 in Geneva. There is also the main International Business Arbitration Institute is the Arbitration Court of the International Chamber of Commerce created in 1923. Its mission is to give arbitral solutions to business disputes having an international character [1].

Within the African Region, sixteen States have signed the treaty for the harmonization of business law in Africa known as OHADA Treaty. This treaty comprises of sixty three articles known as the *Uniform Acts* and the arbitration law occupies an important place in this treaty [2]. From its inception, the preamble of this treaty declares the desire of the member States to promote arbitration as an instrument for settlement of contractual disputes. Its jurisdiction is equal to that administered by the International Court of Arbitration of the International Chamber of Commerce in Paris. Unlike

<sup>1</sup> Arbitration of ICC rules.

<sup>2</sup> Benin, Burkina Faso, Cameroon, Central African Republic, Comoros, Congo, Ivory Coast,

the International Court of Arbitration of the ICC, the Common Court of Justice and Arbitration does not judge itself disputes [3]. The OHADA treaty is applicable since 2000. Arbitration therefore plays an important role with respect to harmonizing business laws in Africa, since by unifying arbitration issues both domestic and international. Unlike the original system of arbitration created under Common Court of Justice and Arbitration, the promoters of the Uniform Acts on Arbitration and the Rules of Arbitration of the CCJA, hoped that these texts will enhance the economic integration of the OHADA member States. Cameroon being a member State has seen its arbitration laws modified by the implementation of the OHADA treaty. This modification is more present in the area of arbitration rules concerning foreigners investing in Cameroon and this leads to modernization of the Cameroonian Code of Civil and Commercial Procedure.

## II. ISSUES THAT MAY BE RESOLVED THROUGH ARBITRATION

### 2.1 Scope of Arbitration

All disputes cannot necessarily be settled by arbitrators because to render justice is a privilege of the State. Consequently, the State can only accept to vest private arbitrations of a jurisdictional function for matters which do not involve public order, for example, an arbitral tribunal cannot give sentence to restrain one's freedom. By reason of this, all repressive domain escapes from arbitration. Thus the scope of arbitration is doubly limited, that is, all people cannot have recourse to arbitration and all disputes cannot be submitted to it.

#### 2.1. A. Those Who Can Have Recourse to Arbitration

There is a belief that arbitration limits itself to disputes between people belonging to the business environment. In fact, it true that the majority of arbitration cases involve industrialists and businessmen. However, the scope of arbitration is larger without being general and therefore everybody cannot compromise that is, have recourse to arbitration. Article 2 of the Uniform Law relating to Arbitration law is also applicable to Cameroon, which is to the effect that any natural or artificial person can have recourse to arbitration on rights that he or she has free disposition.

##### i. Natural Person

Any person can compromise on rights which he/she has free disposition [4]. Consequently, minors and disabled persons who are assimilated have rights to recourse to arbitration through their legal representatives. This presents an interesting problem with regard to family disputes particularly those concerning succession and distribution of assets.

##### ii. Artificial Persons of Private Law

These are companies, associations, and or partnerships. They have the right to have recourse to

arbitration since art. 2059 of the civil code opens this possibility to any person without distinction. But one must determine the organ which has power to engage the artificial person in an arbitral procedure. However, as a general rule, the legal representative of a company has power to act in all circumstances in the name of the company. Therefore, the recourse to arbitration can be decided either by the legal representative acting alone as the manager or the board of directors or the chief executive officer. A special power is not necessary here.

##### iii. Artificial Persons of Public Law

The general rule is that States, (territorial collectivities; regions, departments, councils), and public collectivities cannot participate in arbitration. However, there is an exception to the rule when artificial persons of public law contracts according to private law conditions particularly because it exercises an economic activity. These artificial persons like the State, can have recourse to arbitration for the resolution of disputes arising during the execution of a contract [5]. Art. 2 of the Uniform Act relating to Arbitration states that States and other public collectivities can equally be parties to an arbitration. However, an evolution seems to be desirable, the common law of arbitration had to be applied to public artificial persons each time they exercised a production, distribution and/or service activity.

#### 2.1. B. Matters That Can Be Submitted to Arbitration

The recourse to arbitration is not admitted in matters which concern public order, although its scope is not clearly defined either in domestic or in international law. However, according to art. 2(1) of the Arbitration rules of the CCJA of OHADA, any contractual disputes can be submitted. Arbitrators are not limited only to business disputes. The following disputes can be submitted to an arbitrator:

##### i. Domestic Disputes

In internal order, arbitration is expressly excluded by art. 2060 of the civil code, for everything which concerns the capacity of State and persons. Some matters come directly under public order and escape arbitration. An arbitral jurisdiction would not know how to determine the conditions of creditors' payments the modalities of recovery, transfer or liquidation of a company which has ceased its payment. Meanwhile, disputes concerning industrial properties can be submitted to arbitrators from the moment that the dispute in question does not concern public order and is about rights which the contracting parties have free disposition. In spite of the restrictive terms of art. 2060 of the civil code, public order is not enough reason to prevent arbitration generally.

<sup>3</sup> CCJA

<sup>4</sup> Art. 2059 of the Civil Code.

<sup>5</sup> This is also what appears from the reading of art. 2 of the Uniform Act Relating to Arbitration.

## ii. International Disputes

International arbitration involves the interests of international business. Its scope is larger for the following reasons:

- a. Public order is less present in business matters than in other fields since business disputes do not involve State and persons' capacity which are by nature of public order.
- b. Public order is less restrictive in international business than in domestic public order, is only supplementary in international relations.
- c. International business covers activities which would be civil in domestic law particularly agricultural and State activities.

Consequently, arbitration is intended to be applied to almost all international economic activities.

## iii. Communal Disputes

Difficulties arise when arbitration is applied to communal disputes, in fact, a restrictive and omnipresent communal public order particularly in competition matters, tends to reduce the scope of arbitral disputes. These obstacles to the development of arbitration are regrettable since disputes involve more and more the implementation of communal law.

## 2.2. Resolving Issues through the Process

Arbitrations, although less formal, follow the same general order as a trial. The parties are in arbitration in the first place because it was provided for in the contract, over which the dispute arose, or because they agreed to submit their dispute to arbitration, or because it was mandated by law. After the arbitrator is chosen, he or she calls a pre-hearing conference to clarify the claims and defenses, agree to uncontested facts, take care of special problems, such as discovery and evidentiary issues, and generally to figure out ways to speed up the process.

At the Arbitration hearing, the parties or their attorneys usually will make an opening statement that describes the dispute what the evidence will show, precisely what relief is sought, and why the Arbitration has the power to grant such relief. Next, the claimant (the person who first demanded Arbitration) presents its witnesses and documents and other proof. The respondent (the defendant) has a full opportunity to cross-examine the witnesses. After the claimant has completed its evidence, the respondent presents its witnesses and documents, and the claimant engages in cross-examination.

After all the evidence has been submitted, each party or its attorney a makes final argument, which summarizes the evidence, explains why the party is entitled to win, again explains precisely the relief sought and refutes the arguments made by the opponent. Finally, the Arbitrator closes the Arbitration hearing, and within 30 days, renders his or her decision or award as to all

issues submitted to Arbitration. Usually, the award is limited to a very brief decision without the supporting opinions or reasons of the Arbitrator. The making of the award ends the power of the Arbitrator, unless the parties agree otherwise.

## 2.3. Concerns about Submitting to Arbitration

Despite the advantages of Arbitration, some people harbor valid concerns about submitting their disputes to it. The following sections discuss those concerns. Arbitration has very limited discovery rights. Unlike litigation, which permits – and can compel – extensive discovery, there is no discovery in Arbitration absent the parties' agreement. The Arbitrator, who will usually be inclined to keep the exchange of documents to a reasonable minimum and will not allow depositions unless they can be shown to be "essential." It's human nature for disputants to be tempted to try to hide the ball from each other. We may not be able to find it in arbitration.

Because of the relaxation of the rules of evidence, and the power of the arbitrator to "do equity" – make decisions based on fairness – an arbitrator might render an award than, rather than grant complete relief to one side or the other, splits the baby by giving each side part of what was requested. This may leave both parties feeling that justice was not done.

In litigation, with a wayward judge or a runaway jury, the losing party may be able to overturn the decision by appealing to higher court. In arbitration, unless there was outright corruption or fraud, the award is binding and usually not appealable. To encourage arbitration and discourage litigation, the courts generally hold that the parties who arbitrate a dispute assume all the hazards of the arbitration process, including the risk that the arbitrator may make mistakes in the application of law and in findings of fact. This can happen, because there isn't a mandatory set of "case law" or precedents for arbitrators to follow, and this can lead to uneven results. If the arbitrator makes a mistake in judgment, or turns out to be an idiot, the losing party usually has no remedy – "no appeal." And since nobody and no system is perfect, mistakes happen in arbitration, just as they do everywhere else.

The filing fee for administration of the arbitration costs more than court filing fees, and the arbitrator's fee can be steep and add up quickly, depending on the length of the arbitration hearing. If we lose, there's a possibility we can end up paying our opponent's filing and arbitrator fees in addition to the award. In other words, if we're the little guy against a rich guy, arbitration can cost us a lot more money than we intended.

There are three major ways to avoid – or at least reduce – these problems. First, a little preventive clause can be used in the agreement to arbitrate by specifying:

- Where the arbitration will be held.
- Who will be the arbitrator(s)?
- What law will govern the dispute?
- What discovery will be allowed?
- What deadlines will be imposed on discovery, the hearing and the issuance of an award.
- The right to judicial review of the award concerning whether the arbitrator(s) correctly interpreted questions of law.

Since arbitration is a “creature of agreement,” all these things can be spelled out up front, before the parties have succumbed to the distrust and intractability that so often are part of ongoing disputes.

Second, careful preparation of our negotiation strategy will isolate the information we need to find out from the other side. If we’re not allowed to “discover” this stuff, we can do so during the arbitration hearing itself. In order to avoid hearing the “A” word (Appeal), the arbitrator will permit the parties to place into evidence – for whatever weight it deserves – everything that is relevant, material and non-duplicative in the dispute. One of the few grounds for vacating an arbitration award is the arbitrator’s refusal to hear such evidence. At the hearing, the arbitrator has the power to compel the production of the documents and witnesses relevant and material to the dispute. This may make the hearing longer and more expensive, but because arbitration is binding, it may be the only shot we’ll have. Third, when selecting an arbitrator, we can ascertain whether he or she tends to follow faithfully the law or criteria relevant to disputes, rather than get too creative with remedies. Similarly, we’ll want an arbitrator who will not permit the hearing to go on forever and who will be firm about keeping out irrelevant or cumulative evidence. Of the three ways to avoid the pitfalls of arbitration, the most important is our selection of an arbitrator. The next section provides a guide selecting an arbitrator.

#### 2.4.1. Arbitration Agreements

The recourse to an arbitrator, that is, the renunciation to the State jurisdiction is only possible if the contracting parties agree to one. The voluntary aspect of arbitration is once more highlighted. In fact, commercial contracts often have clauses well prepared in advance in which contracting parties agree to refer any dispute arising from performance of the contract to an arbitrator, or they use the compromise act instead of a litigation to refer their dispute to an arbitrator for settlement. The arbitration clause is a more dangerous act than the compromise because at the moment it is accepted, the contracting parties not only ignore the nature and importance of the dispute which eventually

oppose them, but cannot also measure the consequence of their renunciation to the State jurisdiction.

As earlier mentioned, the essence of arbitration is a voluntary agreement which can arise in the following manner, through an oral agreement or a written agreement created before a dispute arises (arbitration clause) or alternatively after the dispute has already occurred (a compromise).

#### Oral Agreement

In line with the general principle of contract law, an oral agreement to use arbitration as a means of settling disputes is perfectly valid. It is equally binding whether made before or after the dispute has arisen. Therefore oral arbitration agreements face the following problems:

- Either party may at any time before the award is made revoke the authority [6]. This may be done, perhaps by a party who believes he is losing the arbitration.
- Either party may at any time revoke the authority of the arbitrator and then go on to take the dispute to a court of law [7]. If the arbitration agreement was written, not oral, then such unilateral action would not be possible.
- The arbitration award can only be enforced by suing for its enforcement in the courts [8].
- Where statute law requires a written contract or evidence of it, the lack of a written arbitration agreement may mean that the written arbitration award cannot be enforced.

Oral agreements can only relate to an existing dispute, not a future one and to avoid accusation of incompleteness the arbitrator to be named. Oral agreements are relatively rare but could be created during the course of an arbitration resulting from a written agreement where an arbitrator may be asked to settle differences in addition to those originally identified.

#### Written Agreements

Written agreements are frequently found in contracts governing the international sale of goods. By means of such clauses the parties agree in advance to be bound by the decision of a specified third party in the event a dispute arose. The third party may be a neutral entity such as the international chamber of commerce, a panel of individuals representing both parties’ interests or some other group or organization.

The United Nations Convention on the recognition and enforcement of Foreign Arbitral Awards which has been implemented in more than fifty countries, assists in the enforcement of arbitration

<sup>6</sup> Lord v Lee (1868)

<sup>7</sup> Haughton Ltd. v M.F.Kent Services Ltd. (1991)

<sup>8</sup> Arbitration Act 1950 Sect. 26

clauses. If no arbitration clause is contained in the sales contract, litigation may occur. A written agreement will include a telex and by analogy also, a fax [9].

The following are some criteria of a written agreement:

**a. Agreement Must Be Signed**

To come under the Arbitration Acts, the agreement must be in writing but the Act is silent as to whether to be valid, the agreement ought to be signed by both parties. The better view is that a signature, even of one to be made liable, is not essential. In Baker v. Yorkshire Fire and Life Assurance Co. (1892), an insurance policyholder containing an arbitration clause, was said to be a valid arbitration agreement even though the policyholder had not signed it.

**b. Certainty**

An agreement itself, just like all contracts, must be sufficiently capable of being enforceable. In Lovelock Ltd. v. Exporters, (1968), a contractual clause referred "any dispute and or claim" to arbitration in England, but another clause referred "any other dispute" to arbitration in Russia. The court of appeal held that the entire arbitration agreement was void for lack of country.

**c. Single Document or A Set**

For convenience, a single arbitration agreement is to be preferred. However, it is possible to have an arbitration agreement spread over a number of separate documents, taken as a whole, provided that, it can identify which disputes are to be covered and that arbitration is to apply to them. Also, provided that the terms of an agreement to submit to arbitration are contained in a document or documents, prove that those terms were agreed by the parties to be binding upon them may be derived from outside those documents.

**d. Use of a Scott Avery Clause**

This is a clause derived from the Scott v. Avery (1856) case where, an arbitration agreement, the parties agreed not to commence any litigation until after an arbitration award had been made. It was held that such a clause was not illegal as ousting the jurisdiction of the courts but was a condition precedent in that the arbitration award had to be published before either party had access to the courts. Scott v. Avery has set the limits on the freedom of the parties to restrict access to the courts. An arbitration agreement which said that the courts would never be resorted to would be illegal. However, many international contracts contain a clause stating that any dispute arising be subject to the international chamber of commerce arbitration. The standard clause being; "*All disputes arising in connection with the present contract should be finally settled under the rules of conciliation and arbitration of the international chamber of commerce by one or more*

*arbitrators appointed in accordance with the said rules.*" [10].

**Effects of the Agreement to arbitrate in the International Chamber of Commerce**

Where the parties have agreed to submit to arbitration by the international chamber of commerce, they shall be deemed thereby to have submitted ipso facto to the present rules.

1. If one of the parties refuses or fails to take part in the arbitration, the arbitrator shall proceed notwithstanding such refusal or failure.
2. Unless otherwise provided, the arbitrator shall not cease to have jurisdiction by reason of any claim that the contract is null and void, or allegation that it is in existence provided that he upholds the validity of the agreement to arbitrate.
3. Before the file is transmitted to the arbitrator, and in exceptional circumstances even thereafter, the parties shall be at liberty to apply to any competent judicial authority and they shall not by so doing, be held to infringe the agreement to arbitrate.

**2.5. Arbitration Institutes in International Commerce**

Arbitration institutes play a very important role in the development of international business law. Since there is urgent need to ensure that arbitration proceedings are carried out speedily and effectively, many countries and international organizations have sponsored arbitration institutes capable of administering arbitration proceedings.

1. In the socialist countries, the Foreign Trade Arbitration Commission of the Chamber of Commerce serves that function.
2. In Germany, the *Deutsche Ausschuss für schiedsgerichtswesen* reorganized after the 2<sup>nd</sup> world war, and which is made up of industry and trade chambers. All these institutions are not specialized; they can receive any dispute of commercial order on the condition that they are international. That means, where one of the contracting parties must be of a foreign nationality. Each arbitration institute has a list of arbitrators designated by the Chamber of Commerce to which it belongs.
3. In England, there are two very important arbitration institutes. The first is the Institute of Arbitration founded in 1915, has as primary role the training of qualified arbitrators and the second is the London Court of Arbitration created in 1892 by the London Chamber of Commerce. It can arbitrate in all aspects of

<sup>9</sup> Arab African Energy Corp. Ltd. v Online Production Netherlands B.V. (1983)

<sup>10</sup> International Law Material 3<sup>rd</sup> Ed. *Louis Hankins-Hans Smith-Oscae held r Schacher*, p.585.

commercial activities. It disposes of arbitrators list is classified according to their commerce or profession.

4. In the U.S., the American Arbitration Association administers international and domestic cases, and provides information on international arbitration. This arbitration institute organizes arbitral tribunals and disposes of arbitrators' list in all the professions.

The most well-known amongst these international organizations is the Court of Arbitration of the International Chamber of Commerce located in Paris. It was created in 1923 to give *the arbitral solution to business disputes having an international character*. The arbitration court does not have a jurisdictional power and its decisions are simply administrative. The jurisdictional power belongs only to the arbitrators who have been designated by the contracting parties on the list drawn up by the court. The court designates an arbitrator only at the request of the contracting parties. The arbitration court's regulation states that no sentence can be delivered without being approved by it. Also, the arbitration court has power to interpret arbitral sentence. Thus, the arbitration courts enjoy unquestionable authority.

Although these arbitration institutes are many and they vary, they almost have the same way of deciding disputes. Another new arbitration institute is the CCJA created by the OHADA Treaty and whose rules are applicable in Cameroon.

### Uncitral Arbitration Rules

Each of these institutes mentioned above has elaborated their own rules of procedure for administrating arbitration. Although some measures of uniformity can be discerned from a study of these various regulations, it was apparent to the international business community in the early 1970s that there could be harmonizing rules. Drawing on at this sentiment, the United Nations Commission on International Trade Law (UNCITRAL), initiated a study which led a draft set of arbitration rules and which was later adopted and recommended for use by the general assembly of the United Nations in 1976.

The UNCITRAL arbitration rules can be described as a summary of generally accepted principles for conducting international arbitration. The rules describe how to initiate arbitration proceedings, how arbitrators are appointed, how proceedings are to be conducted. The UNCITRAL arbitration rules have been described as an ad hoc procedure, that is, one which does not rely on the service of any one institution for its administration. However, these rules are really not effective unless the parties agree to choose an appointing authority which would help to select the safe arbitrator. Most of the arbitration institutes have declared themselves willing to act as appointing authorities under

the UNCITRAL arbitration rules. In fact, it has become common for parties to adopt the UNICTRAL arbitration rules in combination with a particular appointing authority of their choice.

### 2.6. Making the Choice of a Good Arbitrator

As in mediation, an arbitrator is only as good as the people participating in it, and this is especially true of the arbitrator. One of the big benefits of arbitration is getting to choose who's going to decide our case. But if he or she blows the decision, we're pretty much stuck with it. It's crucial that we choose a good arbitrator. Here's what to look for:

- Someone experienced in the subject matter of the dispute. While there's not substitute for experience, the sheer number of years someone's spent in a certain field doesn't always mean he or she is right for us. Some people learn both good and bad shortcuts as the years go by, and some people have the same "experience" year in and year out. We want to make a few phone calls around town to our friends to help us judge a prospective arbitrator's substantive experience. We'll want to ask the following questions:
  - What kind of education and on-the-job training does he/she have relating to this kind of dispute?
  - What range of awards has he or she given in this type of dispute?
  - Does he or she tend to side with one party or another (e.g., labour or management, plaintiff or defendant in a personal injury action, owner or contractor in construction disputes, etc.)?
  - Has he or she published any articles on the subject?
- Someone experienced in the process of arbitrations. Again, we may not want to pick the most well-known person, who may be too busy to go the extra mile for the parties. But the maxim that there's no substitute for experience is again true here. The arbitrator has to make many important decisions before ever getting to the award, such as the scope of the power of the arbitrator pursuant to the arbitration agreement, the scope of allowable discovery, and the conduct of the hearing itself. We don't want our arbitrator learning on the job while taking charge of our case. We need to ask the following questions:
  - Does the arbitrator spell out the reasons for his or her decision?
  - Do these decisions reflect the contractual agreement of the parties and/or the law relating to the accident or transaction, or does the

arbitrator substitute personal feelings of fairness instead?

- Do his or her awards cover all the issues presented in the arbitration?
  - Does the arbitrator wait to decide the case until all the evidence has been presented?
  - Did the parties arbitrating before him or her believe they got a fair hearing and result?
- Someone who is neutral. By neutral, we mean somebody who won't be intimidated by the notoriety of our opponent or the tactics being pulled during the arbitration. In my experience, the arbitrator really wants to do what's right and resists any attempt to unfairly influence the decision.
  - Someone who is independent. During the selection process, an appointed arbitrator must declare any conflict – such as a financial or personal interest in the outcome - to the parties, and the parties have the right to strike this arbitrator if there appears to be a conflict of interest.

### III. Choice of Place of Arbitration, Arbitration Procedure and Sentence

#### 3.1. Choice of Place/ the Arbitral Setting

The place where the arbitration proceedings are to be held is of great importance to the parties. It is advisable for the parties to name the place in the original clause to which they agree to refer their disputes for arbitration. The ICC standard arbitration clause does not include specification of the place, but the parties are reminded in an information leaflet on the ICC arbitration rules informing them that ICC rules do not in any way, limit the parties' choice of venue for arbitral proceedings. The choice of the place of arbitration is usually understood as an acceptance by the parties that the umpire, that is, the sole arbiter or the chairman of the arbitral tribunal be a national of the country where the proceedings are to be held. By choosing a neutral country as the place of arbitration, parties can be assumed to have expressed confidence in the quality of arbitrators available in the same place.

Where the parties choose an international arbitral institute such as the ICC court of arbitration, they cannot be assumed to restrict their choice of arbitrators to that resident in the country where the arbitral institute has its head office. In the case of such international institutes, the umpire will be chosen on the basis of preferences expressed by the parties and, failing any such expression from a neutral country, deemed suitable by the arbitral institute. Here again, the nationality of the umpire is likely to coincide with the place of arbitration.

The ICC standard arbitration clause does not include specification of the place, but parties are reminded of their free choice of venue for arbitral proceedings in the event of a dispute. The model clause

included in the UNCITRAL rules suggests that parties may specify the place of arbitration in the clause adopting the UNCITRAL arbitration rules.

The model arbitration clause in the UNCITRAL rules suggests that parties may specify the place of arbitration in the clause adopting the UNCITRAL arbitration rules. The choice of a place of arbitration is usually understood as an acceptance by the parties that the umpire, the sole arbitrator or the chairman of the arbitral tribunal be a national of the country where the proceedings are to be held. By choosing a neutral country as the place of arbitration, parties can be assumed to have expressed confidence in the quality of arbitrators available in the same place.

If the parties choose an international arbitral institute such as the ICC court of arbitration, they cannot be assumed to restrict their choice of arbitrators to that resident in the country where the arbitral institute has its head office. In the case of such international institutes, the umpire will be chosen on the basis of preferences expressed by the parties, and, failing any such expression from a neutral country, deemed suitable by the arbitral institute. Here again, the nationality of the umpire is likely to coincide with the place of arbitration.

The place of arbitration is linked not only with the nationality of the umpire but also with the procedural rules governing the arbitral proceedings. It is true that parties have a large measure of freedom to devise procedural rules convenient to them and that their selection of a set of procedural rules such as those of the CCJA or the ICC will be relevant and binding. Therefore, before choosing a particular place of arbitration, parties should therefore make sure that they know to what extent the freedom to arbitrate is limited by mandatory provisions and what supplementary practices exist.

#### 3.2. Arbitration Procedure

The international court of arbitration of the international chamber of commerce is the institute attached to the ICC. It has as mission to enable the resolution by means of disputes having an international character according to the ICC arbitration rules. Also, the court can resolve business disputes which do not have an international character if there exist an arbitration agreement attributing to competence to it. The court does not decide issues itself; it ensures the implantation of rules.

However, as Cameroon has ratified many treaties and international agreements, Art. 45 of the 1996 Constitution states that;

*“Duly approved or ratified treaties and international agreements shall, following their publication, override national laws, provided the other party implements the said treaty or agreement”.* Hence,



Cameroon, being a member, is bound by these rules in the course of an arbitral procedure [11].

### Arbitral Procedure in the ICC

Files are to be transmitted to the arbitral tribunal by the Secretariat as soon as the file is constituted. The court fixes the place of arbitration unless the parties have agreed to it. Unless differently agreed by the parties and after having consulted them, the arbitral tribunal can hold its hearings and meeting in any place it deems appropriate.

### Arbitral Languages

In the absence of agreement between the parties, the tribunal fixes the language(s) of the arbitral procedure by taking into account all the relevant circumstances as the language of the contract.

### Rules of Law Applicable to the Dispute

The parties are free to choose the rules of law that the arbitral tribunal will apply to the dispute. Failing which the arbitrator will apply rules of law that he deems appropriate. In any case, the arbitral tribunal will take into account the terms of the contract and the relevant usage of commerce.

### Terms of Reference

From the date of transmission, the arbitral tribunal establishes on paper or in the parties' presence, the terms specifying its mission. This will contain the following; names, professions of the parties, address of the parties, a summary of parties' claims and the decision sought, an indication of any sum claimed the names, professions and addresses of the arbitrators, the place of arbitration, the details relative to the rules applicable to the procedure, etc. The terms of reference must be signed by the parties and the arbitral tribunal.

### Preparation of the Case

After examination of all parties' writings and documents the tribunal prepares the case for judgment as soon as possible.

### Hearings

When a hearing is held, the arbitral summons the parties or their representatives to appear before it. If one of the parties although duly summoned does not present himself without valid reason, the arbitral tribunal nevertheless has power to hold the meeting. Except with the agreement of the arbitral tribunal and the parties, hearing are not open to outsiders.

### Closing of Debates

The arbitral tribunal pronounces the closing of debates when it deems that the parties have had enough opportunities to be heard. After this date, no writing, agreement or evidence can be presented except at the request of the closing of debates, it indicates to the

secretariat the appropriate date to which the sentence project will be submitted to the court for approval.

### 3.3. Arbitration Sentence

The sentence is the outcome of arbitral procedure. It is because the contracting parties wish to obtain it that they submit their disputes to arbitrators in the first place. Usually, the enforcement of an arbitral award depends on the goodwill of the convicted party.

#### 3.3.a. Conditions of validity of the Sentence

##### Time:

The arbitral tribunal delivers its sentence not more than six months after its last signature on the terms of reference. But this time can be extended.

##### Form:

The sentence must be in writing and the condition is indisputable since an oral sentence will create difficulties of proof which would prevent its enforcement.

**Required Mentions:** The sentence must indicate the following if it has to be valid:

- The name of arbitrators who deliver it.
- The date of the sentence which is essential since it will be able to verify of the sentence has been delivered on time.
- The signatures of the arbitrators.

It is provided that no sentence can be delivered without having been approved by the court. The breach of this rule cannot lead to the sentence being invalid. If one arbitrator refuses to sign, the other arbitrators must state it in the sentence. The signature refusal is an extreme solution that the president of the arbitral tribunal must do all to avoid because it reveals the sentence's imperfection.

**3.3. b. The Effects of the Sentence:** The sentence puts an end to the arbitral proceedings and therefore has different effects.

#### Positive Effects

As soon as the arbitral sentence has been delivered, it has the authority of the thing judged. Consequently, the solution given can only be challenged through an appeal open against the sentence. The parties cannot refer the same dispute neither to a state or arbitral jurisdiction. Any new request which is the same as that which has been the subject of the sentence will not be received. From this view point, the sentence is similar to that of court's decision, as this puts an end to the dispute but the difference is that it is not enforceable. If the loser does not enforce the sentence spontaneously, the recourse to a public force, particularly to operate seizures

<sup>11</sup> Treaty was signed in Mauritius in 1993.

will only be possible after an *exequatur* or a recognition of the sentence.

### Negative Effects

As a general rule, the final arbitral sentence relinquishes the arbitrators from the dispute submitted to them. In fact, they have a duty to resolve disputes by delivering their final judgment; once this is done, their duty is accomplished. However, there are exceptions to this rule.

- The arbitrators can be asked to interpret their sentence at the request of one of the parties. However, this has to be made before any appeal against the sentence.
- The arbitrators have the opportunity to correct material errors which would be found in the sentence particularly calculation errors.

The interpretation and correction requests lead to many practical difficulties and show the inadequacy of the quality of the sentence.

### Sentence Enforcement

The arbitral spirit implies a spontaneous enforcement because the procedure takes place entirely outside the state jurisdiction. This ideal.

### Spontaneous Enforcement

The spontaneous enforcement does not need long discussion. It seems to be the most frequently used solution either because the loser is of good faith or rather because he knows that he would expose himself to disastrous consequences. Many arbitration rules encourage the parties to adopt this position. Thus art. 24 of the ICC rules state that “*by the submission of the dispute to the arbitration of the ICC, the parties engage themselves to execute on time the fore coming sentences and to renounce all means of recourse.*”

### 3.3. c. Recognition of Foreign Arbitral Awards

The signatory countries of the New York convention on June 10<sup>th</sup> 1958 have recognized arbitral sentences delivered abroad. Thus it will be easier in some countries to enforce a foreign arbitral sentence than a foreign judgment. For example, in the U.S. the enforcement of a French arbitral sentence is easier to obtain. Thus a decision which denies the recognition of the sentence of a foreign sentence is likely to go on appeal in limited cases. Consequently, whether in domestic or international law, the arbitral justice loses part of its efficacy if the sentence is not spontaneously enforced or if the loser appeals against the sentence.

## IV. ARBITRATION LAW IN CAMEROON AND THE APPLICATION OF THE OHADA TREATY.

### 4.1. Arbitration Law in Cameroon

In view to secure business relations and to attract international investments, sixteen African States particularly the French-speaking countries, signed a treaty to harmonize business activity in Africa, in Mauritius in 1993 [12]. This treaty, made up of sixty three articles divided into nine titles and aims at endowing the members with the same business law through its texts known as the “Uniform Acts.” By taking into account the contemporary development of arbitration issues within the continent, and also realizing that arbitration has become a common method of dispute settlement in international commerce, the founders of OHADA have given it an important role in the settlement of business transactions. On the other hand, Cameroon being a member state of the OHADA treaty has seen its arbitration laws influenced by the provisions of OHADA rules which has greatly modernized its arbitration rules.

#### A. The OHADA Treaty Arbitration Rules

The arbitration law plays an important role in the OHADA treaty in the its desire to promote arbitration as an instrument for the settlement of contractual disputes. Besides, this same treaty devotes all its entire title IV to arbitration, implementation, and administration by the Common Court of Justice and Arbitration, (ICCJA) This arbitration is equal to that administered by the international court of arbitration of the ICC at Paris. Since internationally and universality are features of the ICC arbitration, one can be very comfortable about this similarity between the two arbitration systems because its rules form a whole in which the main legal traditions join themselves. Thus, as the ICA of the ICC, the CCJA does not decide itself disputes; it constitutes a tribunal to do it. For arbitral tribunal constitution, the arbitrators designated by the parties must be confirmed by the CCJA exactly as the ICC does. In case of disagreement between the parties on the number or choice of arbitrators, the ICCJA will take their place by taking into account the nature and complexity of the dispute. Contrary to the ICA, the CCJA has the list of arbitrators for each year, to which it can have recourse to compensate the disagreement or failure of the parties to appoint an arbitrator, the arbitral tribunal president or even a co-arbitrator. Once constituted, the arbitral has as mission to decide the dispute by means of a final and compulsory sentence for the parties.

In the course of procedure, the CCJA as the ICA is the only one competent to received request for arbitrator’s replacement. When it deems that there is a need for one or more arbitrators’ replacement, the CCJA grants the parties fifteen days for proceedings to the designation of arbitrators. In cases of disagreements

<sup>12</sup> These countries have given the enforcement of arbitration agreements to the Organization got

between the parties at the expiry date, the CCJA proceeds as indicated above to the arbitrators' replacement. No partial or final sentence can be delivered by the arbitral tribunal without prior approval of the CCJA which can modify it but only on its form [13]. The OHADA treaty specifies that the arbitral sentence has a final character and can make the object of a compulsory enforcement. The compulsory enforcement of the sentence will be necessary only if it has not been spontaneously enforced by the loser. In this case, the beneficiary of the sentence will obtain an *exequatur* decision that the CCJA is the only one to deliver [14]. Thus, the CCJA decision has the authority of the thing judged; these decisions are enforceable in each member state in the same conditions as the decisions of domestic jurisdictions [15]. The CCJA being the solely competent to deliver *exequatur* decisions, these decisions are equally enforceable in each member state. The CCJA can refuse to grant the *exequatur* to enforce an OHADA arbitral sentence only in the following cases:

- The arbitrator has given a decision without an arbitration agreement or on a void or expired one.
- The arbitrator has ruled without complying to the mission which had been conferred to him.
- The arbitrator has not respected the principle of contradictory procedure.
- The sentence is contrary to the international public order.

These provisions of the OHADA treaty relating to the enforcement of arbitral sentences recall that of the New York convention of June 1958 for the recognition and enforcement of foreign arbitral awards. The similarity between the two texts has to be approved since the 1958 convention constitutes another legal instrument of reference which has greatly contributed to the expansion of international business arbitration. Having been ratified by an important number of countries in the world among them some member countries of the OHADA, the 1958 convention will enable the beneficiary of an OHADA sentence to obtain enforcement of his sentence outside the OHADA space, on condition that this enforcement be sought in a state having ratified the convention in question.

In any case, inside the OHADA space, the enforcement of an OHADA arbitral sentence, will arise with the cooperation of the CCJA [16]. This regulation will complete the provisions of the treaty relating to arbitration administered by the CCJA and must give details on how to refer a dispute to the CCJA in arbitration matters; the contents of the arbitration

request, the time and the modalities of file transmission to the arbitral tribunal by the CCJA, the obligation of the tribunal to establish terms of reference before commencing hearings. Although the OHADA treaty provides for an institutional arbitration whose administration is given to the CCJA, however, a close reading of this treaty reveals that the ad hoc arbitration is equally provided what is confirmed by the reading of some uniform acts actually in force.

#### 4.2. The OHADA Institutions

OHADA is an international organization having a legal personality distinct from its member's states and therefore enjoys privileges and immunities recognized by international public law. The functioning of the organization is ensured by the council of finance and justice ministers of all member states, presided each year by each state. It is instituted in the Common Court of Justice and Arbitration. It is made up of seven judges elected for seven years by the Council of Ministers amongst the nationals of the member states.

The court elects among its members; its president and two vice-presidents for three years and a half, non-renewable. The head office is in Abidjan, Ivory Coast. A clerk is appointed by the president at the secretariat. The permanent secretarial is the administrative organ of OHADA and its head office is Yaoundé. It is managed by a permanent secretariat appointed by the Council of Ministers for four years renewable once. Finally, it is created at Port Novo, Benin, a Regional School of Higher Education and Magistracy which ensures the training and improvement of magistrates and justice auxiliaries of member states. In fact, regional institutions as the CCJA and OHADA, aim at enabling Africa have its own legal environment to answer specific problems.

#### 4.3. Arbitration and the Uniform Acts

Art. 23 of the OHADA treaty states *that*,

*“Any tribunal of a member state referred to by parties who had agreed to submit their disputes to arbitration, will declare itself incompetent if one of the parties asks it and will send back if necessary to the arbitration procedure provided by the present treaty.”*

Usually, in arbitration matters, the parties have the choice between the institutional or the ad hoc arbitration. Thus Art. 23 above simply states the incompetence of state jurisdictions when contracting parties have agreed to submit their disputes to arbitration or if their contract contains arbitration agreement. In such assumption, if the parties had provided for an ad hoc arbitration in their arbitration agreement, it will be useless to compel them to have an institutional

<sup>13</sup> Art, 24

<sup>14</sup> Art. 22 of the OHADA Treaty.

<sup>15</sup> Granted by ruling of the President of the CCJA, Art. 20 Of the OHADA Treaty.

<sup>16</sup> Arts. 22(6) and 26 of this treaty make reference to an arbitration regulation of the CCJA not yet available.

arbitration as Art. 23 suggests. The parties will be sent back to the arbitration provided by the OHADA treaty, that is, the institutional arbitration administered by the CCJA only if they had chosen in their arbitration agreement this type of arbitration.

Besides, a combination of this Art. 23 of the OHADA treaty with the Articles 147-149 of the Uniform Acts relating to the Law of Commercial Companies and Economic Interests Association, enables us to clearly affirm that the ad hoc arbitration is equally provided by the OHADA legislative systems. In fact, dealing with disputes between partners or between one or many partners of the company. Art. 148 states that these disputes can equally be submitted to arbitration. Article 149 specifies that arbitration is governed by the application of the uniform acts provisions relating to arbitration which is actually available. It is however, possible to think that this uniform act will essentially treat ad hoc arbitration and will send back to the OHADA treaty and to the arbitration regulations of the CCJA disputes concerning institutional arbitration. The parties to a commercial company act as to any trade act, have the choice between ad hoc and institutional arbitrations. Therefore Art. 149 sends it back to an institution or ad hoc arbitration according to the convenience and choice of the parties.

Thus the OHADA treaty and the Uniform Act relating to the Law of Commercial Companies contain provisions relating to the arbitration law. One can only regret that the Uniform Act carrying on the general commercial law does not contain a provision expressly specifying at the image of Art. 631 of the French Trade Code that disputes involving trade acts decide the competence of the jurisdiction in commercial matters in each member state. These disputes can also be submitted to arbitration if the parties so desire. It is inconceivable that the Uniform Act wanted to exclude the possibility for the parties to a trade act to settle their disputes by means of arbitration. Articles 147 and 148 of the Uniform Act precisely states that disputes relating to acts affected by the company can equally be submitted to arbitration. Thus, arbitration as a means of dispute settlement cannot have been provided only for acts concerning commercial companies and not for other types of trade acts as well. From the preceding development, it seems that the OHADA legislative system plans an arbitration law as it is practiced nowadays.

However, for them to be used by the parties, the rules stated above must be completed wither by the arbitration regulation provided for by the OHADA treaty itself or the Uniform Act relating to Arbitration. To which Art. 149 of the Uniform Acts relating to the Law of Commercial Companies and Economic Interest Association sends back. Therefore, one has to hope that

the two expected texts will remain close. By the publication of these two complementary texts, one ought to see the impact of OHADA rules actually available and stated above on the Cameroonian arbitration law.

#### 4.4. Application of the Ohada Treaty in Cameroon

Cameroon being a member state of the OHADA treaty, the country has ratified the treaty by decree No. 96/177 [17], by the President of the Republic, Mr. Paul Biya, who formally received the authorization to ratify it by law No. 94-4 [18]. Thus the OHADA arbitration rules stated above reflect the application of the common law of arbitration in Cameroon and in waiting for the system to be completed by the two other texts equally mentioned earlier, have an influence on the Cameroonian investment law.

##### 4.4.1. The Impact of OHADA Arbitration Rules on Cameroonian Investment Laws

Like most of the African countries desiring to foster and promote investments in their national territories, Cameroon has adopted an investment code regulating fiscal and custom duties advantage in favour of natural or moral foreign persons who want to invest in its territory. Besides these advantages, the investment code creates a law for foreign companies opened in Cameroon to choose arbitration as a mode of dispute settlement relating to the validity and interpretation of letters of acceptance, the non respect of guarantee awards and implicit commitments taken by the Cameroonian government in their favour.

Accordingly, these foreigners have the possibility to choose either an ad hoc arbitration or an institutional arbitration but this choice has to be done when the foreign company signs its Articles of Association. Concerning institutional arbitration, the investment code expressly aims at the arbitration of the ICC of Paris and that of the International Center for the Settlement of Disputes relating to investments. Also, when the rules available to the OHADA arbitration have been filled in by the arbitration rules of the CCJA relating to arbitration, the Uniform Act relating to arbitration, it becomes imperative to include the Cameroonian code of investments to the arbitration administered by the CCJA as another type of institutional arbitration to which anyone interested in Cameroon, can invest and by its investment code.

The Cameroon government has given proof of realism in introducing arbitration in its investment code at the moment where this mode of dispute settlement is more and more adopted by the international community either for the protection of international investment or for the of international commercial disputes. One would have hoped that this realism would go to modernize the rules of domestic arbitration contained in the trade code

17 September 5<sup>th</sup> 1996.

18 August 4<sup>th</sup> 1994.

and in the code of civil and commercial procedure applicable in Cameroon.

#### 4.4.2. The Impact of Common Law on Arbitration

Here the common law of arbitration is constituted of the provisions of the Trade Code relating to Arbitration and that of the Code of Civil and Commercial Procedure. Concerning the Trade Code, articles 51-63 of this text instituted compulsory for the resolution of disputes between partners of a commercial company, while Art. 631 of this same code entrusted the settlement of these disputes to the commercial tribunal. The uncertainty created by these contradictory provision in a same text of law has been denounced and it is fortunate that the Uniform Act relating to the Law of Commercial Companies and Economic Interests Association which came into force on January 1<sup>st</sup> 1998 clearly indicates on the one hand, that any dispute between parties or between one or many partners and the company comes within its competent jurisdiction in commercial matters, and on the other hand, that this dispute can equally be submitted to arbitration either by arbitration clause or a compromise. Similarly, the compulsory arbitration provided by the 1926 law does not exist anymore in Cameroon [19]. As in any modern legislative system, arbitration in Cameroon finds its source in an arbitration agreement which can be an arbitration clause or a compromise. This had already been impliedly recognized with the ratification by Cameroon on the 19<sup>th</sup> of June 1988 for the Recognition and Enforcement of Foreign Arbitral Awards, convention whose Article 2 states:

- Each contracting state recognizes the writing agreement by which parties compel themselves to submit to arbitration all disputes or some disputes which may arise or could arise between them.
- Writing agreements means an arbitration clause inserted in a contract or a compromise signed by the parties or contained in an exchange of letter.
- The tribunal to which parties have referred their dispute and have concluded to an arbitration agreement, this tribunal will send back the parties to arbitration at the request of one party except it has noticed that this arbitration agreement has lapsed, inoperative or unlikely to be applied.

In spite of these provisions, the Code of Civil and Commercial Procedure has undergone no amendment and continues to consider arbitration only on the basis of a compromise [20]. The OHADA treaty being already an integral part of the Cameroon legal

environment and specifying that the arbitration clause or the compromise constitutes the arbitration foundation. The Cameroonian legislator could follow the provisions of this treaty in order to modernize the rules of ad hoc arbitration [21]. Thus as earlier stated, it is only when this treaty has been completed or filled in by the arbitration rules of the CCJA and by the Uniform Act relating to Arbitration that this system will constitute an arbitration device likely to be used or chosen by the parties. The arbitration system so constituted will therefore have a direct influence on the arbitration law either in Cameroon or in other member states having ratified the OHADA treaty because the rules drawn up will be directly applicable and compulsory within the member states [22]. In other words, where a member state does not have an arbitration law, its arbitration law will be constituted by the provisions of the OHADA treaty. On the other hand, members' states already having an arbitration law like Cameroon, the new rules will replace the existing ones. These new rules will take into account the provisions of domestic law, previous or subsequent provisions of the OHADA treaty only if they are not contrary to these rules. It is for this reason that it seems reasonable to follow the OHADA treaty in order to modernize the ad hoc arbitration provided for by articles 576 – 601 of the Code of Civil and Commercial Procedure applicable in Cameroon.

Finally, the rules of OHADA and the Uniform Acts carry rules relating to arbitration laws and it would be interesting to review these rules in terms of modernizing arbitration law with regards to Cameroonian arbitration law. This could be achieved by publishing the two complementary texts of OHADA arbitration system which are the arbitration rules of the CCJA and the Uniform Act relating to arbitration.

## 5. Advantages and Disadvantages of Arbitration in International Commercial Transactions

Arbitration as a means of dispute settlement in international commercial transactions has its advantages and disadvantages or shortcomings. These are some of the reasons why arbitration is usually favoured in business transactions over litigation.

### 5.1. ADVANTAGES

#### A. Privacy

The proceedings are held in private, thus the exposure of sensitive disputes issues to the glare of the public are avoided. The parties can actually agree on the identity of the individual or organization to settle the dispute. The entire proceedings take place in private. Of all the advantages, privacy is the outstanding one, this is commercially significant when considered that the whole court procedure is in public and as such, the public has

<sup>19</sup> This law was for the fixation of new prices of the lease in case of renewal of a commercial lease.

Art. 69-102 of the Uniform Acts on the General Commercial Law.

<sup>20</sup> Arts. 576-601 of this code regulates an ad hoc arbitration on the ground of a compromise.

<sup>21</sup> Arts. 576-601 of the CCCP.

<sup>22</sup> Art. 10 of the OHADA Treaty.

free access which would lead to undesired publicity and the possibility of disclosure of trade secrets. In *Lonrho Ltd. v. Shell Petroleum Co. Ltd et al.*, 1981, it was alleged by Lonrho that Shell Petroleum had given assurance to the authorities in Northern Rhodesia that they would defy an international embargo and continue to supply oil to the constitutionally illegal regime that had declared unilateral independence. Lonrho took their dispute against Shell Petroleum to arbitration but on losing, they appealed to the High Court, the Court of Appeal and the House of Lords, thereby ensuring the maximum publicity of Shell Petroleum's dubious business practice. However, in most instances, arbitration proceedings remain private as appeals and challenges to arbitrations are rare. The dispute may be resolved entirely on the basis of written submissions without attendance by the parties. Thus arbitration is in the private while courts are in the public sector of the industry. The subject matter of the arbitration may remain confidential.

### B. Expertise

An arbitrator will usually have expert knowledge in the area of dispute. In many cases, the nature of the dispute, in terms of the issues it raises, will determine the academic and professional discipline of the arbitrator [23]. Furthermore, the parties' "discovery rights"; their ability to find out the other side's information – are far more limited than in litigation. Arbitration is a convenient way of settling disputes in that, although formal rules of evidence are often applied, it is at the discretion of the arbitrator and the parties.

### C. Convenience

While the arbitrator is independent of the parties and their powers are considerable regarding the organizing and coordinating of the arbitral process, nevertheless a careful arbitrator always tries to work with the parties. Therefore, when it is a matter of arranging and timing preliminary meetings or fixing the time and venue of the hearing they will consider the convenience of the parties. For instance, with litigation, the convenience of the courts takes precedence. The rules of evidence are relaxed; the atmosphere is more relaxed and flexible than in a court of law. Arbitration is seen as less confrontational than litigation and it is more likely that a business relationship between the parties will be preserved beyond the dispute.

There are fewer procedural rules, compared with litigation. Virtually everything can come into evidence, and the arbitrator gives it the weight he or she thinks it fairly deserves. Nevertheless, arbitration is a judicial process in that, like the courts, the arbitrator reaches his decision on the evidence presented to him and in using their own knowledge and experience.

The rules in arbitration can be modified by agreement of the parties for a particular dispute. It has also been suggested that the voluntary nature of arbitration makes it the most civilized method of resolving commercial disputes. Arbitration is intended as a mechanism for resolving disputes as opposed to litigation which may involve appeals to higher courts, thus creating further uncertainties and greater costs.

### D. Speed and Simplicity

The arbitral proceedings may be faster and cheaper than litigation. The proceedings may combine business relationship while arbitration is occurring. The parties involved may select an arbiter with special knowledge of industry. A major attraction is that the procedure of the hearing can be much more informal and relaxed than that of the court. An informal approach does not mean there is no procedure. An arbitrator must follow certain principles; it is a judicial role so he must always work within the rules of natural justice. But where the parties have more freedom of maneuver, than the courts, particularly, where the parties have not agreed in advance to any precise procedure. With the permission of the parties, the arbitrator can adopt whatever procedure that seems most appropriate.

Largely as a consequence of relative simplicity, arbitration can be quick, in other instances; it can be resolved within hours, days or a few weeks. In other circumstances, arbitrations may last for years. Very arbitrations were criticized in *Peter Cassidy v. Osuustukkukaup IL (1957)* by Derlvin J., when he stated that "*it is of course beyond dispute that if business prefers an expensive and lengthy procedure (arbitration) in this case, lasting over three years, to that which the courts provide, they are entitled to have it.*" This remark was made after he dealt with the case in one and the quarter hour! Where arbitration is more prone to be lengthy in international commercial transactions, speed is necessary in reaching a final decision [24]. All the various types of speedy arbitration proceedings require the arbitrator to provide a figure or an amount he deems will be fair in the settlement of the dispute.

### E. Costs

Depending on the type of case, arbitration is usually cheaper than litigation. The average cost of arbitration, again according to the American Arbitration Association, is a \$300 filing fee, an administrative fee based on a reasonable percentage of the amount in controversy, and the hourly fee of the selected arbitrator, which is usually in the range of \$125 to \$200. Some parties, to avoid filing and administrative fees, make private arrangements for their own arbitrator, and pay only his or her hourly fee. In litigation, the judges and courtrooms are already paid for through your tax dollars. But when you add up the discovery costs in a heavily

<sup>23</sup> Justice Mocatta was of that opinion in *Gunter Henck v. Andre et le S.A (1970)*

<sup>24</sup> "Kitchen table", "sniff and feel", "pendulum, "flip-flop" for final arbitration.

contested litigation, it usually costs more than arbitration, particularly if the case goes to trial.

The arbitration is final and binding, and enforceable in a court of law. In addition to the parties' contract or submission agreement, which will usually provide that the award will be binding, state statutes governing arbitration permit an appeal of an award only on the most limited grounds, such as the arbitrator's refusal to hear relevant evidence. As a practical matter, a law court will almost never overturn an arbitration award. The avoidance of the time, cost, and risk of an appeal is, for some people, a plus. The parties get to choose the arbitrator, who is usually an expert in the subject matter of the dispute. Because the parties mutually select the arbitrator, he or she is likely to be neutral, independent, and experienced. In litigation, the judge is neutral and independent, and an expert in legal principles and procedures. We don't get to choose the judge, however, so we can't avoid a judge who has little technical experience in the subject matter of our dispute, is incompetent, or just doesn't like us.

## 5.2. Disadvantages of Arbitration

### A. Limited Rights and Powers

An important factor in arbitration is that, inevitably arbitrators have less power than judges. A judge can dismiss a claim for want of prosecution, while an arbitrator cannot, unless he has specific authority to do so derive from rules governing the particular arbitration. The arbitrator's power is limited to the issues submitted to arbitration. However, with respect to those issues, the arbitrator can apply both legal (statutes and case law) and equitable (fairness) principles. The remedies available to the arbitrator are usually fixed by these principles, and the arbitrator cannot normally devise creative alternatives solutions to the dispute.

A dispute can only be referred to arbitration by the consent of both parties. This is found in an arbitration clause, however, such clauses have often been used in consumer contracts, where their justification is less clear and may offer a number of disadvantages to the consumer. For instance, the consumer may be suspicious of an arbitration conducted by the business trade association. Also, an arbitration clause in a consumer contract may operate to exclude the consumer's right to take a dispute to court can be used to deny consumer's justice.

Another major point on the demerits of arbitration is that an arbitral award is final. With agreement between the parties, an appeal to the High Court on a point of law that substantially affects the rights of one or more of the parties may be possible although grounds for doing so are rather narrow.

### B. Joining of Third Parties

If the dispute involves parties other than those privy to the arbitration agreement, as might occur under

construction contracts where an employer, main contractor, and one or more sub-contractors, may all be in dispute with each other, the award the arbitration makes, is not binding on third parties. This can be contrasted to a court action where a third party may join to the action and be bound by the court's decision. Art 5 of the Uniform Act states that arbitrators are appointed, dismissed or replaced in accordance with the agreement of the parties. Where there is no such arbitration agreement or where the agreement is not sufficient; in arbitration with three arbitrators, each part appoints a third arbitrator. If the party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of them. The New York Convention of 1958 broadly construes the authority of arbitral panels and severely limits the power of a party to overturn an arbitral award. However, the enforceability of an award is recognised only where the nation of the party has ratified the convention and only where the dispute is commercial in nature. The parties to an agreement (contractual) must establish through their contractual negotiations the body of rules that will/should govern their transactions.

### B. Complex Legal Issues

When the issue in dispute is one of fact then arbitration is an excellent way in which to resolve it, but if the issue is a substantial one of law, it may well be better to litigate. In *Fairclough Dodd & Jones Ltd. v. Vantol Ltd.* (1957), a dispute occurred over a term in standard form issues by the London oil and Tallow trades association. Both parties chose to arbitrate but the two arbitrators appointed could not agree. To break the deadlock, an umpire was appointed but said that the matter had to be referred to a court for adjudication.

### D. Enforcement of Arbitral Awards

One of the disadvantages of arbitration is that, an arbitrator, having reached a decision and made an award, may be unable to enforce it. Should an award not be met, it can only be enforced by taking action in the law courts. This is one basis that a written binding arbitration agreements creates a contract a contract and failure to comply with the arbitrator's award may give rise to an action for a breach of contract. A simple procedure for enforcement is provided in England by Section 26 of the Arbitration Acts, 1950 (as amended), so that an award may be enforced in the same way as a court order, subject to an application for enforcement being approved by the High Court.

Advantages and disadvantages are almost the same and apply in the case of the OHADA treaty since it has followed most of the rules of international arbitration. But what makes the peculiarity of the OHADA treaty to that of other international arbitration institutes; it has been drawn for African countries, to give solutions to the problems of this part of the world. Therefore advantages which derive from it are:

- The OHADA treaty has directly introduced arbitration agreements in the positive law of all its members [25]. Before the coming into force of the OHADA treaty, most of its member states recognized only the compromise, the basis to submit a dispute to arbitration.
- OHADA arbitration or the uniform acts relating to arbitration is applied as well as to international than in domestic arbitration. It is also not only used for commercial arbitration, since it is used for any contractual disputes as well.
- The OHADA arbitration does not have nationality or geographic limitation criteria. A simple contract, a simple geographic localization by the domicile of one of the parties, is enough in order to have recourse to OHADA arbitration. It is the proof that although aiming at African companies, the OHADA arbitration can be perfectly adapted to the resolution of disputes above the borders.

Consequently, the OHADA arbitration law presents a double aspect; on the one hand, a uniform law relating to arbitration of common law, and on the other hand, a specific arbitration administered by the CCJA in its function as an arbitration institute. So parties in their arbitration agreements can choose to be bound by either the arbitration rules of the Uniform Act or that of the CCJA. However, these advantages also have a positive effect on the arbitration law of Cameroon.

The OHADA arbitration rules actually have a practical effect on the Cameroonian arbitration law. For example, the arbitration clause or compromise, in article 21, serves as a foundation for arbitration proceedings in Cameroon. The arbitration tribunal is made up of one or three arbitrators [26], and finally, the provision that any state tribunal to which a dispute has been referred by parties who have an arbitration clause in their contract, must declare itself incompetent on the request of one party. If the list of prospective arbitrators doesn't offer someone who's experienced, neutral and independent, we should demand a supplemental list or see if our opponent will agree to someone both sides like, but who's not on the list. Choosing a good arbitrator will reduce the chance of a bad award. If we exercise the most careful consideration, we may end up with an arbitrator who fulfils the job description, specified for judges; four things belong to a judge [27], to hear courteously, to answer wisely, to consider soberly and to decide impartially.

## CONCLUSION

The New York Convention of 1958 broadly construes the authority of arbitral panels and severely limits the power of a party to overturn an arbitral award. However, the enforceability of an award is recognised only where the nation of the party has ratified the convention and only where the dispute is commercial in nature. The parties to an agreement (contractual) must establish through their contractual negotiations the body of rules that should govern their transactions.

More recently, the OHADA Treaty has created a body to which powers to make laws have been conferred. Secondly, it has created a Common Court of Justice and Arbitration with headquarters in Abidjan.

An outgrowth of this trend has been the emergence of several major arbitral institutions that have conducted their own sets of rules and procedures. The New York Convention of 1958 broadly construes the authority of arbitral panels and severely limits the power of a party to overturn an arbitral award. However, the enforceability of an award is recognized only where the nation of the party has or is a member of the Convention or treaty and where the dispute is commercial in nature.

Disputes are an inescapable fact of life and the crises they engender are pretty much shared by many business organizations. Today, more and more business organizations are successfully resolving disputes through mediation, negotiation or arbitration. In negotiation, the opposing parties try to settle their differences on their own. In mediation, a neutral person helps the parties reach their own settlement. In arbitration, an impartial third person listens to the opposing parties and renders a binding decision for them. Dispute settlement is therefore a necessary tool in international relations as it fosters peaceful climate within which countries can improve on diplomatic relations between them. In order to maintain peace and stability, the international communities including regional and national entities try every day to strengthen state commitments to dispute mechanisms for disputes to be resolved peacefully without fear of use of force.

With regards to the application of OHADA rules, emphasis has been placed on international business transactions in Cameroon generally in the promotion of trade and investment in stabilizing trade and investment within states. The strict involvement of parties to arbitration is an added advantage especially when there is an arbitration clause in the contract between the parties. Nevertheless, parties entering into an agreement must always try to pay attention when drafting an arbitration agreement to avoid situations that may render

<sup>25</sup> The case of Cameroon, arts. 576-601 of its Code of Civil and Commercial Procedure.(CCCP).

<sup>26</sup> Art. 22.

<sup>27</sup> Socrates, 4000 years ago.



the agreement null and void when a dispute later arises in the course of their contract.

OHADA has incorporated arbitration as a means of settling disputes with the hope of maintaining peace and stability within the region. However, arbitration under OHADA has not limited itself to what concerns commercial matters alone thus civil matters can also be brought under the ambit of the law, although this is an induced aspect of arbitration under OHADA, as it is not clearly stated in any provision of the law whether it involves both commercial and civil. Albeit, it is clearly stated that OHADA rules involve principally commercial disputes. Moreover, the OHADA legislation was elaborated with inspiration from the ICC rules nevertheless, some loopholes in its provisions remains.

While litigation will remain an important way to resolve many disputes, alternative dispute resolution (ADR) is increasing very rapidly. An outgrowth of this trend has been the emergence of several major arbitral institutions that have conducted their own sets of rules and procedures. However, the parties to a contract are free to opt for a more informal or ad hoc arbitration arrangement based on their own set of guidelines. Such agreements are legally enforceable as long as the parties have agreed to abide by the arbitrator's decision.

With the coming into force, the OHADA treaty, an important part of the African continent is now endowed with a modern and unified law which favours economic development. One major setback involves the unilateral and technocratic manner in which the framers of the treaty used in drawing up the Uniform Acts, without the consultation of officials such as nationals, parliamentarians and other stakeholders.

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#### **THESIS**

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